NO. 83-1072

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY; AND
MARK V. MEIERHENRY, ATTORNEY GENERAL
STATE OF SOUTH DAKOTA,

Petitioners,

v.

DENNIS LUFKINS

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD P. TIESZEN
Attorney at Law
Post Office Box 66
Pierre, South Dakota 57501-0066
Telephone: (605) 224-8851

Attorney for Respondent
[APPLICATION FOR ADMISSION PENDING]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 83-1072

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY; AND
MARK V. MEIERHENRY, ATTORNEY GENERAL
STATE OF SOUTH DAKOTA,

Petitioners,

v.

DENNIS LUFKINS

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals for the Eighth Circuit properly ordered the State of South Dakota to conduct a new trial after finding Respondent was denied effective assistance of counsel.

STATEMENT OF THE CASE

During a rubbing alcohol and wine drinking party on December 4, 1979, one Sylvester Johnson was allegedly clubbed in the head with an axe handle at the residence of Ernest Hayes in Sisseton, South Dakota. Johnson purportedly died while being driven to the hospital by Ernest Hayes, who then aborted his drive to the hospital, leaving the decedent's body on a church lawn. The decedent's body was discovered on the following day and an autopsy revealed death to be caused by a subdural hematoma.

Respondent was interrogated while incarcerated on a DWI sentence in the Sisseton County Jail and as a result of such

interrogation, Respondent signed an inculpatory statement. Respondent was thereafter arraigned on first degree manslaughter and habitual criminal informations. Pleas of not guilty were entered to both charges.

Respondent later changed his plea to guilty on the manslaughter charge thereby terminating a jury trial which was in progress. Upon sentencing however, the trial court refused to accept Respondent's plea of guilty and rescheduled the matter for trial after Respondent was unable to admit to striking the decedent. On the same day, Respondent himself filed a handwritten list of objections to the proceedings against him. The handwritten objections, among other things, stated that the Respondent denied having hit the decedent; that Respondent had been told by officers that things would go easy for him if he signed the voluntary statement and that at the time of his voluntary statement, the officers were "hollering" at him and that generally his state of mind was not clear. No voluntariness hearing was conducted and trial again commenced approximately one month later.

During the second trial, three witnesses testified that they had been drinking wine and rubbing alcohol with the Respondent for most of the day upon which the incident occurred. Although the witnesses all testified that Respondent struck the victim with the axe handle, pretrial transcripts illustrated that the witnesses memories were leaden at best. Respondent's sister also testified at the second trial that Respondent had been at her home at the times that the alleged offense was to have been committed.

Respondent's incriminating statement was received into evidence in the presence of the jury and before any cross-examination was tendered by Respondent's trial counsel. In spite of the handwritten objections filed with the trial court which claimed Respondent's statement not to have been voluntary and irrespective of Respondent's vocal denial at trial during the

officer's testimony that he made such a voluntary statement, Respondent's statement was offered and received in evidence prior to any cross-examination of the state's testimony in support thereof.

The state's evidence on the voluntariness of the statement which included the testimony of Sheriff Long and Department of Criminal Investigation Agent Peterson was taken during the course of the trial, in open court and in the jury's presence. No request for an independent voluntariness hearing outside the presence of the jury was made by Respondent's trial counsel. The testimony that the statement was voluntarily given was presented during the state's case in chief. During such testimony, Respondent rose to his feet and challenged the veracity of the Sheriff with respect to such statement. The trial judge had before her Respondent's pretrial handwritten objections to the voluntariness of his statement. Nevertheless, the statement was entered into evidence after direct examination but before any cross-examination of the Sheriff; before any corroborating testimony by Agent Peterson and before Respondent was given any opportunity to present any rebuttal evidence.

Respondent was convicted of first degree manslaughter; he also plead guilty to the habitual offender charge and was sentenced to life imprisonment.

On direct appeal, a divided South Dakota Supreme Court rejected all of Respondent's claims affirming his conviction. State vs. Lufkins, 309 N.W.2d 331 (SD 1981) (Morgan and Fosheim, J. J. dissenting). Among Respondent's claims before the South Dakota Supreme Court was the claim that he was denied due process by the admission of his incriminating statement without a prior determination of its voluntariness outside the jury's presence in addition to his claim that he was denied effective assistance of counsel. The South Dakota Supreme Court under apparent mistaken impressions or misreading of the trial transcript, found that the

trial court had impliedly ruled that the statement was given voluntarily stating that:

> "After Sheriff Long was extensively questioned in the presence of the jury by both the state and appellant [Respondent] regarding the voluntary nature of the statement, the trial court admitted the statement into evidence over appellant's objections." 309 N.W.2d at 333. [EMPHASIS ADDED]

The South Dakota Supreme Court cited in support of its decision, this Court's case of Pinto vs. Pierce, 389 U.S. 31 (1967) and found that:

> "By not making the appropriate objection, appellant's trial counsel consented to the taking of evidence in the jury's presence on the voluntariness of the statement." Id. at 335.

Respondent thereafter filed an application for a writ of habeas corpus in Federal District Court raising the same voluntariness and ineffective assistance of counsel claims as were before the South Dakota Supreme Court. The District Court received briefs from both sides and granted a motion for expansion of the record pursuant to 28 U.S.C. §2254, Rule 7 to include transcripts of all state court proceedings. The Federal District Court then determined Respondent's claim with respect to ineffective assistance of counsel could not be resolved without the assistance of an expanded record and granted an evidentiary hearing pursuant to 28 U.S.C. §2254(d).

During the evidentiary hearing, Respondent's trial counsel was called as a witness by the state and extensively cross-examined by Respondent's habeas counsel with respect to Respondent's ineffective assistance of counsel claim.

The District Court, by memorandum opinion, granted Respondent's writ of habeas corpus relying on Jackson vs. Denno, 378 U.S. 368, 380 (1964) concluding that Respondent was denied a full and fair hearing. Specifically the District Court found Respondent to have been denied a full and fair hearing where the trial court made no distinct finding of voluntariness of the statement and where the statement was admitted before cross-examination of Sheriff Long; before Respondent could

present any evidence of his own and where Respondent had not specifically waived his right to the voluntariness hearing being conducted outside the jury's presence. The District Court remanded the case to the state judicial system for Respondent to receive a new full and fair voluntariness hearing.

After the the District Court concluded that Respondent's appropriate remedy on the voluntariness of his statement issue was a new full and fair voluntariness hearing, the District Court dealt with Respondent's ineffective assistance of counsel claim. The District Court found that Respondent's trial counsel did not exercise minimal skill in the representation of Respondent by failing to have tested the voluntariness of Respondent's statement outside the presence of the jury particularly where Respondent had himself filed handwritten objections claiming the statement to have been involuntary. The District Court further found that at the very least competent counsel would have raised a due process objection to conducting the voluntariness hearing in the jury's presence rather than making a "catch-all objection" to admission of the statement as characterized by Respondent's trial counsel at the habeas evidentiary hearing. The District Court additionally noted ineffectiveness on the part of the Respondent's trial counsel by his having bolstered state's witnesses after Respondent challenged their veracity in open court and by counsel's failure to sequester the three leaden memoried eye witnesses whose testimony was not particularly reliable.

Pursuant to the District Court's finding on the second issue of ineffectiveness of counsel, the Court concluded Respondent was significantly prejudiced to his right to a fair trial emphasizing the weaknesses of the government's case apart from Respondent's incriminating statement and ordered that Respondent be granted a new trial.

Petitioners thereafter appealed the District Court's order of a new voluntariness hearing and new trial to the Eighth

Circuit Court of Appeals which affirmed Respondent's right to a new voluntariness hearing on the first issue and affirmed the District Court's decision to grant Respondent a new trial on the issue of ineffective assistance of counsel. Petitioners herein thereafter filed its petition for a writ of certiorari.

ARGUMENT

Petitioners argue the lower court erred by requiring the state of South Dakota conduct a new trial or release Respondent. Petitioners appear to admit at the outset of their argument that Respondent did not receive a full and fair voluntariness hearing for purposes of their petition to this Court. (Petitioners' brief, p. 10). Although Petitioners acknowledge that the lower courts' mandate of a new trial to Respondent was based on the Court's finding that he received ineffective assistance of counsel, Petitioners nevertheless attempt to argue that Jackson vs. Denno, supra, must govern the remedy providing only a new voluntariness hearing. (Petitioners' Brief, p. 10, 11). In spite of Petitioners' acknowledgement of a singular issue presented here, their statement of facts nevertheless attempts to argue Respondent failed to exhaust claims and that the lower courts raised the issue of a full and fair voluntariness hearing sua sponte. (Petitioners' Brief, p. 6).

Respondent contends that both the lower courts clearly acknowledged the guidance of Jackson vs. Denno, supra, and cite that case in support of their finding that a new voluntariness hearing must be held. Both lower court decisions are careful to recognize that the reason for Respondent's entitlement to a new trial is their finding of ineffective assistance of counsel and not by reason of the denial of due process stemming from the manner in which the voluntariness hearing was conducted.

As characterized by the Eighth Circuit Court of Appeals, Petitioners' argument that Respondent is only entitled to the remedy of a new voluntariness hearing under the Jackson vs. Denno rule is superficial. The lower court recognized that although

the District Court primarily focused on the issue of voluntariness of the statement, the granting of a new trial was pursuant to the resolution of the issue of ineffectiveness of counsel and not as a result of a defective voluntariness hearing.

In Jackson vs. Denno, supra, this Court dealt only with the issue of voluntariness hearings identifying that which would be constitutionally mandated to determine the admissibility of a confession. Neither of the lower courts deviated from this Court's guidance in Jackson and approved the new hearing remedy authorized therein with respect to the full and fair voluntariness hearing issue. Jackson vs. Denno did not attempt to limit the remedy to a new voluntariness hearing where ineffective assistance of counsel occurred in conjunction with and as an inherent part of the denial of a full and fair voluntariness hearing. The issue of ineffectiveness of counsel was not before this court in Jackson vs. Denno. One can therefore hardly accuse the lower Federal Courts of deviating from the rule in Jackson vs. Denno. To the contrary, they have totally abided by the Jackson rule in granting only a new voluntariness hearing with respect to the issue of Respondent's confession.

Certainly, it is easy for Petitioners to argue that Jackson vs. Denno has been improperly applied where the issue of ineffective assistance of counsel is such an integral part of the issue dealing with Respondent's voluntariness hearing on the confession. Both issues contain failures on the part of trial counsel to provide effective representation. Nevertheless, the lower court decisions clearly reflect that different remedies were provided in the resolution of two separate issues and in accordance with both the law and the facts. The Eighth Circuit Court of Appeals recognized the inherent relationship between the two issues when it held that:

> "The remedy in Jackson vs. Denno was not intended to cover situations where counsel prejudices his client's right to a fair trial by failing to request an independent

voluntariness hearing outside of the jury's presence." (See Petitioners' appendix A-75.)

The ineffectiveness of counsel in the present case was not limited to one failure to carry out his duty as effective counsel. Both the lower court decisions note that trial counsel's overt actions throughout the trial undercut his own theory of the defense that Respondent had not himself committed the act. Trial court counsel bolstered the state's case by promoting the credibility of state's witnesses even though Respondent himself was only moments before leaping to his feet in the courtroom and challenging the veracity of the same witnesses. Both lower courts also recognized the three eye witnesses were not sequestered according to the record.

Petitioners dedicate much of their brief to the argument that trial counsel's bolstering of witnesses was only incidental and therefore harmless. Petitioners further argue that the failure to sequester witnesses is conjecture on the part of the lower courts.

Respondent submits that the record presented to both of the lower courts is silent as to any sequestration of the three memory leaden witnesses who had engaged in the consumption of rubbing alcohol on the night the incident occurred. Petitioners attempt to augment the record on this issue by submitting affidavits in support of its motion for rehearing before the Eighth Circuit Court of Appeals, should not now be considered nearly four years after the fact.

Finally, Petitioners argue to this Court in support of its request that certiorari be granted, that the United States Court of Appeals for the Eighth Circuit decision is in conflict with other courts in deciding a federal question. Respondent submits, however, that the only conflicting decision in the lower courts which has been identified by Petitioners is that of Martinez vs. Estelle, 612 F.2d 173, 177 (5th Cir. 1980). Respondent submits Petitioners have misread Martinez and that a careful reading of

that case supports that it is not in serious conflict with other rulings. The mere overruling of an objection to the admission of a confession under Martinez does not sufficiently comply with due process in compliance with the Jackson rule. Martinez is not in direct conflict with the holdings that there must first be a reliable determination on the issue of voluntariness by a court and that such reliable determination is a condition precedent to the admission of such a statement.

The United States Court of Appeals for the Eighth Circuit clearly stated that Respondent's right to a new trial finds its basis in the ineffective assistance of counsel claim where Respondent's trial counsel failed:

> "To request an independent voluntariness hearing; to inform Lufkins [Respondent] that he had an opportunity to challenge the voluntariness of his statement in a separate hearing during which he could testify without jeopardizing his right to remain silent; to make any objection to holding the hearing in the jury's presence; and to object to the trial court's admission of the statement without the benefit of cross-examination of the state's witnesses." (See Petitioners' Appendix, A-69).

Additionally, the Eighth Circuit Court of Appeals clearly recognized that Respondent's trial counsel's bolstering of Agent Peterson's testimony as to the voluntariness of Respondent's statement and failure to sequester witnesses in conjunction with counsel's failures outlined above seriously undercut Respondent's efforts to defend himself. Based on the record, the lower courts were indeed justified in finding that Respondent was prejudiced in his defense. Such prejudice to Respondent is evidenced where the trial record fails to show that:

> "[The] other evidence of guilt presented at trial...was substantial to a degree that would negate any possibility of actual prejudice resulting from the admission of [the] inculpatory statement." Wainwright vs. Sykes, 433 U.S. 72, 91 (1977). (See Petitioners' Appendix A-71, 72).

Petitioners principally argue that if a new voluntariness hearing determined Respondent's statement to be voluntary, trial counsel's ineffective assistance would be harmless error. Petitioners advance the argument that other acts or omissions by

counsel although ineffective assistance were insignificant, incidental and harmless error.

Respondent submits that ineffective assistance of counsel must be viewed as a whole. One act or omission of duty by counsel alone may not necessarily constitute ineffectiveness. When trial counsel's representation as a whole is viewed, however, counsel's assistance can hardly be considered effective.

In the case at bar, the prejudice experienced by Respondent, as recognized by the Eighth Circuit Court of Appeals "would not be cured by a subsequent determination of voluntariness in a full and fair voluntariness hearing." (Petitioners' Appendix A-74). The lower court recognized the resulting prejudice of trial counsel's failure to sequester unreliable witnesses and bolstering of the state's witnesses.

Lastly, Petitioners advance argument that Pinto vs. Pierce, supra, was somehow misinterpreted by the lower court. Respondent submits the lower courts have properly read the Pinto rule as requiring specific waiver by counsel in order to hold the voluntariness hearing in the jury presence. More importantly, however, the Eighth Circuit Court of Appeals stated that:

> "Even assuming trial counsel's failure to object to the jury's presence constitutes waiver under Pinto, the trial court's procedures were still constitutionally defective because ... they were incapable of insuring a fair and reliable determination of voluntariness." [Petitioners' Brief Appendix A-60].

Clearly then, the lower Court recognized that the true lack of due process in the way the voluntariness hearing was conducted was the lack of a reliable determination where the statement was admitted as evidence before cross-examination, corroborating testimony or rebuttal. Petitioners' argument with respect to Pinto vs. Pierce only clouds the real issue of whether Respondent received a fair and reliable determination of the confession's voluntariness and whether Respondent's counsel was so ineffective that Respondent should receive a new trial.

CONCLUSION

Petitioners' brief in support of the application for writ of certiorari suggests that the lower courts in this case granted Respondent a new trial contrary to this Court's holdings in Jackson vs. Denno, when resolving the issue of whether Respondent received a full and fair voluntariness hearing. Such is not the case as is well identified in the lower courts' decisions which reflect that the appropriate remedy of a new voluntariness hearing was awarded Respondent on that issue. The new trial was granted in resolution of the issue of ineffective assistance of counsel and this Court's holdings in both Jackson vs. Denno and Pinto vs. Pierce have been appropriately acknowledged and followed by the lower courts as reflected by their well reasoned decision. For the foregoing reasons, Respondent respectfully submits that this Court should decline Petitioners' request for a writ of certiorari.

Respectfully submitted,

/s/ Richard P. Tieszen
RICHARD P. TIESZEN
Attorney for Respondent
DUNCAN, OLINGER, SRSTKA, LOVALD
& ROBBENNOLT, P. C.
117 East Capitol, P. O. Box 66
Pierre, South Dakota 57501-0066
Telephone: (605) 224-8851

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the Respondent's Brief in Opposition upon all parties required to be served in regard to the above-captioned matter, namely; the Petitioners herein, by and through their attorney of record, at his last known address, as follows: MR. THOMAS H. HARMON, Assistant Attorney General, State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5090; by first class mail, postage prepaid, on this 29th day of February, 1984.

/s/ Richard P. Tieszen
Richard P. Tieszen

IN THE SUPREME COURT

OF THE UNITED STATES

HERMAN S. SOLEM, Warden,
South Dakota State Penitentiary,
and MARK V. MEIERHENRY,
Attorney General of South Dakota,

Petitioner

vs.

DENNIS LUFKINS,

Respondent.

83-1072

MOTION FOR LEAVE

TO PROCEED

IN FORMA PAUPERIS

(28 U.S.C. §1915,
U.S. S.Ct. Rule 46)

* * * *

COMES NOW, the above-named Respondent by and through his Eighth Circuit Court of Appeals court-appointed attorney and respectfully moves this Court for leave to proceed as a respondent in the above-captioned proceedings without being required to prepay fees, costs or give security therefor by and for the specific reasons as set forth in the Affidavit attached hereto in support of this Motion and by this reference incorporated herein as though fully set forth at this place.

DATED this 29th day of February, 1984.

DUNCAN, OLINGER, SRSTKA, LOVALD
& ROBBENNOLT, P. C.
117 East Capitol, P. O. Box 66
Pierre, South Dakota 57501-0066

By: Richard P. Tieszen
Richard P. Tieszen
Court-appointed counsel for
Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the Motion for Leave to Proceed In Forma Pauperis in regard to the above-captioned matter upon the Petitioner herein, by and through their counsel of record, at his last known address, as follows: MR. MARK V. MEIERHENRY, Attorney General, Attorney's General's Office, State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501; by first class mail, postage prepaid, on this 29th day of February, 1984.

Richard P. Tieszen

Richard P. Tieszen

IN THE SUPREME COURT

OF THE UNITED STATES

HERMAN S. SOLEM, Warden,
South Dakota State Penitentiary,
and MARK V. MEIERHENRY,
Attorney General of South Dakota,

Petitioner

vs.

DENNIS LUFKINS,

Respondent.

83-1072

AFFIDAVIT IN SUPPORT

OF MOTION FOR LEAVE

TO PROCEED

IN FORMA PAUPERIS

* * * *

I, Dennis Lufkins, declare that I am the Respondent in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to the relief granted me by the United States Court of Appeals for the Eighth Circuit and by this Motion and Affidavit seek leave to respond to Petitioner's Petition for Certiorari in forma pauperis.

1. Are you presently employed? Yes ( ) No (X)
   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

   _____

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

   Sept. 1983 last employed; $234.00/month

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment?
      Yes ( ) No (X)
   b. Rent payments, interest or dividends?
      Yes ( ) No (X)
   c. Pensions, annuities or life insurance payments?
      Yes ( ) No (X)
   d. Gifts or inheritances?
      Yes ( ) No (X)
   e. Any other sources?
      Yes ( ) No (X)

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months: _____

3. Do you own cash, or do you have money in checking or savings account?
Yes (X) No ( ) (Include any funds in prison accounts)

If the answer is "yes", state the total value of the items owned. approximately $3.00 in prison account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
Yes (X) No ( )

If the answer is "yes", describe the property and state its approximate value. 10 acres land in Roberts County, South Dakota; approximate value unknown - not leased

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. one son, unable to contribute to his support

6. I further here state that Richard P. Tieszen was appointed pursuant to 18 U.S.C. §3006(a)(d)(6) by the United States Court of Appeals for the Eighth Circuit wherein proceedings were held in forma pauperis and that I presently am not seeking leave to proceed in forma pauperis in any other court below.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 1984
(date)

Signature of Respondent

Subscribed and sworn to before me this 21 day of February, 1984.

LOIS ANN ROSE
NOTARY PUBLIC
SOUTH DAKOTA
SEAL
My Commission Expires Aug. 15, 1986
(SEAL)

Notary Public, South Dakota
My Commission Expires: 8-15-86

CERTIFICATE

I hereby certify that the Respondent herein has the sum of $2.05 on account to his credit at the S.D. State Penitentiary institution where he is confined. I further certify that respondent likewise has the following securities to his credit according to the records of said institution.:
N/A

Dated at Sioux Falls, South Dakota, this 21st day of February, 1984.

Linda K. Trunk - Inmate Bookkeeper
Authorized Officer of Institution